Supreme Court, U.S.
FILED
OCT 2 - 2008
OFFICE OF THE CLERK

No. 08-271

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

DELBERT COPPLE, CARL HEINRICHSMEYER
and DONALD HYATT,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

* *Counsel of Record*

Counsel for Amicus

October 2, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RECEIVED
OCT - 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. THE PROPER STANDARD OF CAUSATION AND NEGLIGENCE ARE FUNDAMENTAL ISSUES ARISING UNDER FELA WHICH CONTINUE TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS	3
A. Certiorari Should Be Granted Because the Erroneous Interpretation of FELA By the Court Below Has A Real, and Significant, Impact on the Outcome of FELA Cases	4
B. There Is No Evidence That FELA Was Meant to Incorporate Anything But Common Law Concepts of Negligence and Causation	10
II. IT IS NOT THE ROLE OF THE COURTS TO INCORPORATE NO-FAULT COMPENSATION PRINCIPLES INTO FELA WHERE CONGRESS DID NOT INTEND TO DO SO; MOREOVER; IT IS BAD PUBLIC POLICY	15
CONCLUSION	21

TABLE OF CONTENTS—Continued

Page

APPENDIX A: Order of the United States District Court For the Western District of *Kentucky* in *Krieg v. CSX Transportation*, Inc. (Sept. 25, 2006) 1a

APPENDIX B: Order of the United States District Court for the Eastern District of California in *Koller v. Burlington Northern Santa Fe Railway Company* (May 8, 2002) 6a

TABLE OF AUTHORITIES

CASES	Page
Armstrong v. Kansas City Southern Ry. Co., 752 F.2d 1110 (5th Cir. 1985)	5, 6
Bailey v. Vermont Cent. R.R., 319 U.S. 350 (1943)	14, 16
Baker v. Baltimore & Ohio R.R., 502 F.2d 638 (6th Cir. 1974)	10
Beeber v. Norfolk Southern Corp., 754 F. Supp. 1364 (N.D. Ind. 1990)	4
Booth v. CSX Transp., Inc., 211 S.W.3d 81 (Ky. App. 2006)	8
Chesapeake & Ohio Ry. Co. v. De Atley, 241 U.S. 310 (1916)	11
Clark v. St. Paul & Sioux City R.R., 28 Minn. 128 (1881)	11
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994)	20
Coray v. Southern Pac. Co., 335 U.S. 520 (1949)	14
Davis v. CSX Transp., Inc., 2005 WL 1935676 (W.D. Ky. 2005)	7
DeBiasio v. Illinois Central R.R., 52 F.3d 678 (7th Cir. 1995)	18
Farwell v. Boston & Worcester R.R., 4 Metc. 49 (Mass. 1842)	11
Frazier v. Norfolk & Western Ry. Co., 996 F.2d 922 (7th Cir. 1993)	18
Gibson v. Erie Ry. Co., 63 N.Y. 449 (1875)	11
Harbin v. Burlington Northern Ry. Co., 921 F.2d 129 (7th Cir. 1990)	4
Howard v. Canadian Nat'l/Illinois Central R.R., 233 Fed. Appx. 356 (5th Cir. 2007)	9

TABLE OF AUTHORITIES—Continued

	Page
Jarrett v. CSX Transp., Inc., 2008 WL 4239148 (N.D. Ohio 2008)	8
Johnson v. Cenac Towing, Inc., 2008 WL 4330553 (5th Cir. 2008)	9
Johnson v. Southern Pac. Co., 196 U.S. 1 (1904)	10
Jones v. Cent. of Georgia Ry. Co., 331 F.2d 649 (5th Cir. 1964)	20
Kansas City Southern Ry. Co. v. Nichols Construction Co., 2008 WL 3850547 (E.D. La. 2008)	9
Koller v. Burlington Northern Santa Fe Ry. Co., No. Civ. S-01-914 GGH (E.D. Calif. 2002)	7
Kreig v. CSX Transp., Inc., No. 3:05CV-456-H (W.D. Ky.)	7
Lang v. N.Y. Cent. R.R., 255 U.S. 455 (1921)	14
Lewandowski v. Nat'l R.R. Pass. Corp., 882 F.2d 815 (3rd Cir. 1989)	20
Louisville, Nashville & Great Southern R.R. v. Fleming, 82 Tenn. 128 (Tenn. 1884)	12
Metro North Comm. R.R. v. Buckley, 521 U.S. 424 (1997)	20
Mondou v. N.Y., N. H. & Hartford R.R., 223 U.S. 1 (1912)	13
Monessen Southwestern R.R. v. Morgan, 486 U.S. 330 (1988)	20
Morawa v. Consolidated Rail Corp., 819 F.2d 289 (6th Cir. 1987)	20
Mounts v. Grand Trunk Western R.R., 198 F.3d 578 (6th Cir. 2000)	20

TABLE OF AUTHORITIES—Continued

	Page
Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003)	6
Norfolk Southern Ry. Co. v. Sorrell, 127 S.Ct. 799 (2007)	3, 8, 13, 20
Northwestern Pac. R.R. v. Bobo, 290 U.S. 499 (1934).	14
Oglesby v. Southern Pac. Transp. Co., 6 F.3d 603 (9th Cir. 1993)	4
Parker v. Atchison, Topeka & Santa Fe Ry. Co., 263 Cal.App.2d 675, 70 Cal. Rptr. 8 (Cal. App. 1968)	3
Rivera v. Union Pac. R.R., 378 F.3d 502 (5th Cir. 2004)	4
Rogers v. Missouri Pac. R.R., 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957)	4, 5
Scarano v. Cent. R.R. of New Jersey, 203 F.2d 510 (3rd Cir. 1953)	20
Schirra v. Delaware, L. & W. R.R., 103 F.Supp. 812 (M.D. Pa. 1952)	18
Schneider v. Nat'l R.R. Passenger Corp., 987 F.2d 132 (2d Cir. 1993)	18
Seaboard Coast Line R.R. v. Gillis, 321 So.2d 202 (Ala. 1975)	18
Southern Ry. v. Gray, 241 U.S. 333 (1916)..	14
St. Louis-S.F. Ry. v. Mills, 271 U.S. 344 (1926)	14
Tennant v. Peoria & Pakin Union Ry. Co., 321 U.S. 29 (1944)	14
Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943)	11
Uflik v. Metro-North Comm. R.R., 77 F.3d 54 (2nd Cir. 1996)	5

TABLE OF AUTHORITIES—Continued

Page

Urie v. Thompson, 337 U.S. 163 (1949) 14
Wilkerson v. McCarthy, 336 U.S. 53 (1949) 15, 16
Williams v. Long Island R.R. Co., 196 F.3d 402 (2nd Cir. 1999) 4

STATUTES

Act of Aug. 11, 1939, c. 685, 53 Stat. 1404 .. 11
Federal Employees Compensation Act, 5 U.S.C. §8101 *et seq.* 15
Federal Employers' Liability Act, ... *passim*
45 U.S.C. §§51-60 2
45 U.S.C. §53 12
45 U.S.C. §54 11
Jones Act, 46 U.S.C. §30104 9
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* 16
Safety Appliances Act, c. 196, 27 Stat. 531 (1893) 10

OTHER AUTHORITIES

A. Larson & K. LARSON, LARSON'S WORKERS COMPENSATION LAW (2004 ed.) 16, 17, 19
Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION *MONITOR* (No.4) (1995) 18
H.R Rep. No. 1386 (1908) 13

TABLE OF AUTHORITIES—Continued

Page

Interstate Commerce Commission, Statistics of Railways in the United States 1908 (1909) 10

Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995) 18

Peter M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE (1998)..... 17, 19

Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305 (1998)..... 15

S. Rep. No. 460 (1908)..... 12

IN THE

Supreme Court of the United States

No. 08-271

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

DELBERT COPPLE, CARL HEINRICHSMEYER
and DONALD HYATT,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association represent-

[1] AAR has provided notice of its intent to file a brief to the parties in accordance with Rule 37.2(a). Both parties have consented to AAR's filing of an *amicus curiae* brief. Letters expressing such consent have been filed with the Clerk of the Court. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

ing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

This case, arising under the Federal Employers' Liability Act (FELA), presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

The issue raised in this case can arise in thousands of FELA cases and can significantly impact the damage awards in those cases. In *Norfolk & Western Ry. Co. v. Ayers*, this Court held that FELA plaintiffs with symptoms of an asbestos-related injury could recover damages for reasonable fear of cancer so long as that fear was "genuine and serious." The Court also made clear that it anticipated that lower courts would utilize verdict control devices to limit fear of

cancer claims to only those supported by evidence of genuine and serious emotional distress. In this case, the court below affirmed the trial court's decision to permit the plaintiffs' fear of cancer claims to go to the jury, supported only by plaintiffs' testimony of generalized worry, uncorroborated by any objective evidence. If courts continue to take this kind of approach to claims for fear of cancer—and there is a split among lower courts on this issue—it will open the floodgates to such claims in virtually all of the thousands of FELA asbestos cases pending against AAR member railroads, an outcome clearly not intended by this Court's decision in *Ayers*. In its brief, AAR will urge this Court to grant certiorari in order to provide much needed guidance to lower courts in order to avoid this result.

All of AAR's large members, who are facing numerous FELA claims in which fear of cancer damages likely will be sought, have a strong interest in the issue presented by this case. When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective of an entire industry, which often is different from that of the individual litigant,

who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

SUMMARY OF THE ARGUMENT

This Court should grant the petition because this case presents an issue that will impact thousands of cases arising under the Federal Employers' Liability Act. 45 U.S.C. §§51-60. This Court has held that plaintiffs who have an asbestos-related injury may recover pain and suffering damages for fear of contracting cancer, but only if that fear is genuine and serious. The Court made it clear that this qualification was intended to require trial courts to limit the number of cases where plaintiff would qualify for such damages. In permitting the plaintiffs' fear of cancer claims to go to the jury based only on their testimony of generalized concern and worry, the court below failed to play the gatekeeper role envisioned by this Court. To date, lower courts have taken different approaches to fear of cancer claims in FELA cases, but several have done little to ensure that only claims of genuine and serious fear go to a jury or that juries are properly instructed when addressing such claims.

There are thousand of FELA asbestos claims pending against railroads. In addition, there are many other FELA cases pending where the plaintiff has alleged exposure to a substance, other than asbestos, which is claimed to cause cancer. In virtually all of these cases, damages for fear of cancer are

likely to be sought. Without guidance from this Court on the proper definition of "genuine and serious" fear, and the nature of the evidence sufficient to bring such a claim to a jury, lower courts will continue to address this issue in a non-uniform manner. Moreover, if courts adopt the approach followed by the court below, it will open the floodgates to fear of cancer claims, exactly the opposite of the result that this Court envisioned.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO PROVIDE GUIDANCE TO LOWER COURTS ON AN IMPORTANT ISSUE THAT WILL IMPACT THOUSANDS OF PENDING AND FUTURE FELA CASES

The ruling below served to enhance the plaintiffs' recovery, but in doing so failed to pay heed to a recent pronouncement by this Court on an important issue arising under FELA. In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that FELA plaintiffs with asbestosis could recover damages for reasonable fear of cancer, as a component of pain and suffering, so long as that fear was "genuine and serious," but "resisted" providing any elaboration on the nature of the evidence required to sustain a claim for genuine and serious fear of cancer. *Id.* at 158, n. 17. This Court should resist no longer. Because the issue that confronted the court below will recur in state and federal courts throughout the country in virtually every FELA asbestos case, and will directly impact the quantum of damages for which defendants will be liable, guidance from this Court is required.

A. The Court Below Ignored the Limitations on Fear of Cancer Recovery Established By This Court in *Ayers*

In permitting recovery for fear of cancer, as a component of pain and suffering damages, by plaintiffs who suffer from an asbestos-related injury, this Court most definitely did not intend that all FELA plaintiffs falling into that category may qualify for damages for fear of cancer. Following on concerns expressed in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) and *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997),[2] the *Ayers* opinion makes it clear that such claims are to be "cabined" by the requirement that fear of cancer damages are available only to those plaintiffs who can demonstrate a "genuine and serious" fear. 538 U.S. at 158-59. This Court went to great lengths to point out that in permitting a FELA plaintiff with asbestosis to recover fear of cancer damages, it was doing so with "an important reservation." *Id.* at 157. Responding to Justice Kennedy's dissenting opinion, which suggested the Court was ignoring the concerns expressed in *Gottshall* and *Buckley* over the "unlimited and unpredictable" liability that would follow a failure to limit the availability of damages for fear of cancer, the majority explained that verdict control devices available to trial courts will assuredly avoid that result. *Id.* at 159, n.19. Clearly, the *Ayers* Court anticipated that trial courts would take an active role as gatekeepers over such claims.[3]

---

[2] In both *Gottshall* and *Buckley*, this Court enunciated limiting rules on recovery for emotional distress out of concern over unlimited and unpredictable liability.

[3] This Court's specific reference to verdict control devices is significant, and should send a message to lower courts, which

The court below did nothing of the kind. It rejected petitioner's suggestion that the court utilize the definition of "genuine and serious" fear proposed by Justice Breyer in his opinion in *Ayers*,[4] as a "more stringent standard than that handed down by the Court." *Blackburn v. Illinois Cent. R.R. Co.*, 882 N.E.2d 189, 193 (Ill. App. 2008). However, the court made no attempt to provide an alternative definition to the "genuine and serious" qualifier enunciated by the *Ayers* Court as a prerequisite for recovery of fear of cancer damages. Instead, it simply held that plaintiffs' testimony expressing concern or worry about contracting cancer, without more, was sufficient to send the issue to the jury.[5] There was no discussion about what constitutes sufficient evidence of genuine and serious fear, or how the approach fol-

---

often are very reluctant to utilize verdict control devices in favor of FELA defendants, primarily based on the belief that FELA's recovery promoting purpose prohibits this traditional exercise of judicial authority. *See e.g., Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638, 641 (6th Cir. 1974)("FELA's liberal purpose must be kept in mind when confronting arguments that would restrict an employer's liability under the Act."); *See also Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994)(reversing summary judgment for railroad); *Kansas City Southern Ry. Co. v. Nichols Construction Co.* 2008 WL 3850547 (E.D. La. 2008) ("FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Id.* at *3)

[4] Justice Breyer proposed that fear of cancer damages be limited to situations where the plaintiff's fear "is unusually severe-where it significantly and detrimentally affects the plaintiff's ability to carry on with everyday life and work." 538 U.S. at 187 (Breyer, J. concurring and dissenting in part).

[5] The Court compounded the problem by giving an instruction that suggested that the plaintiffs' fear of cancer was, in fact, genuine and serious. *See* Petition at 11-12.

lowed by the court below will serve to "cabin" fear of cancer claims brought under FELA. Surely when this Court prominently insisted that only genuine and serious fear of cancer merits recovery, it meant something beyond the plaintiff's testimony the he or she worries about cancer, or some variant of such testimony, was necessary to sustain such a claim.

B. Guidance From This Court is Needed Because This Issue Will Impact Numerous Cases Arising Under FELA

Guidance from this Court on the nature of the evidence required to sustain a fear of cancer claim is needed now. Currently, thousands of FELA claims alleging asbestos-related disease are pending against the nation's railroads. In addition, there are many pending claims that allege an injury resulting from other exposures that plaintiffs typically have attempted to link to cancer, such as diesel exhaust and industrial solvents. All of these cases raise the potential for including "fear of cancer" as an element of the plaintiff's damages. This issue also will impact cases that arise under the Jones Act, a compensation statute governing seamen which incorporates the substantive law of FELA. 46 U.S.C. §30104(a); *see Hagerty v. L&L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *modified on denial of reh'g en banc*, 797 F.2d 256 (1986)(permitting Jones Act plaintiff to recover for fear of cancer).

Asbestos litigation in the railroad industry has followed the general pattern seen in the civil justice system as a whole.[6] Claims were first seen in

---

[6] See Edward J. McCambridge, *Asbestos Litigation: Where We Have Been, Where We Are Now, Where We Are Going*, 57 FED'N DEF. & CORP. COUN. Q. 409 (2007).

significant numbers in the early 1980s. While at various points it appeared that FELA asbestos claims were in decline, the number of filings invariably picked up again. Despite the fact that significant use of asbestos in the rail industry ended in the 1950s with the phase-out of steam locomotives, FELA claims for asbestos-related injures continue to be filed in large numbers. This phenomenon is no doubt driven in part by the active efforts of plaintiffs' counsel to mine for new claims. *See Adams v. Herron*, 191 F.3d 447, 1999 WL 710326 (4th Cir. 1999) (Plaintiffs' counsel offered free x-rays, which were reviewed and interpreted by a non-treating physician hired by the firm.) "Asbestos litigation over time has been shaped by . . . the rise of a sophisticated and well-capitalized plaintiff bar." RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION 21 (2005).

The eight largest U.S. freight railroads and Amtrak have advised the AAR that there are about 9,500 pending asbestos cases at this time. Since *Buckley* has ruled out claims based solely on exposure, in all of these cases the plaintiff presumably alleges that he is suffering from an asbestos-related injury, the very kind of claim which *Ayers* holds potentially qualifies for fear of cancer damages.[7] Even if the relatively small sum of $30,000, which was awarded to each of the plaintiffs in this case, is awarded to each plaintiff in pending cases, the resulting liability would be

---

[7] *Buckley* held that individuals who are exposed to asbestos, but who are without symptoms of a disease, cannot recover for emotional distress. 521 U.S. at 427. Though some of the pending FELA claims allege that the plaintiff has cancer, the railroads report that these constitute less than 5% of the total. Thus, the vast majority of the pending FELA asbestos claims allege a non-malignant asbestos-related injury and are likely to include a fear of cancer allegation.

nearly $285,000,000. While some claimants might be awarded less, other could be awarded far more for fear of cancer damages. In *Ayers*, the verdicts for the six plaintiffs ranged from $770,000 to $1.2 million. 538 U.S. at 144. Considering that the plaintiffs were not seriously ill, and were retired (precluding damages for lost wages), it is likely that the jury made substantial awards for fear of cancer damages.

Fear of cancer claims will not necessarily be limited to asbestos litigation. *See Ayers*, 538 U.S. at 150, n.10. (Citing to cases alleging fear of cancer due to exposures to substances other than asbestos.)[8] The large railroads report that several hundred FELA claims are pending in which the plaintiff alleges exposure to other substances that purportedly also can result in contracting cancer. Specifically, rail employees and former employees have brought and continue to bring claims alleging they have been injured due to workplace exposure to alleged carcinogenic substances, such as diesel exhaust, chemical solvents, silica and other toxic or deleterious substances. *E.g., Baker v. Norfolk Southern Ry. Co.*, 514 S.E.2d 448, *cert. denied*, 528 U.S. 1021 (1999) (Alleging locomotive engineer's cancer was caused by prolonged exposure to exhaust from railroad's diesel locomotives.)[9]

---

[8] Claims for fear of diseases other than cancer have been recognized under FELA. *E.g., Marchica v. Long Island R.R.*, 31 F.3d 1197 (2nd Cir. 1994)(Fear of contracting AIDS.)

[9] In 2006, class action lawsuits were filed against Norfolk Southern and CSX Transportation, and their predecessor railroads, by and on behalf of locomotive engineers and conductors alleging injury due to exposure to diesel exhaust. Among other things, the complaints allege that the plaintiffs suffer from fear of cancer. *See Taylor v. CSX Transp., Inc.*, 2007 WL 2891085 (N.D. Ohio 2007)(denying class certification).

The magnitude of this issue is further heightened for railroads because they can potentially be liable for all damages suffered by plaintiffs with asbestos-related, or other types of, injuries, even when railroad employment caused a minimal amount of any of the harm suffered. In *Ayers*, this Court held that FELA's joint and several liability scheme prohibited apportionment of damages among joint tortfeasors. As a result, if any exposure to a harmful substance occurred during the plaintiff's railroad employment, the railroad can be held liable for the full extent of the damages even if the majority of the harmful exposure can be attributed to other employment.[10] The effect of this rule is underscored by the fact that one of the *Ayers* plaintiffs was "exposed to asbestos [at the railroad] for only three months" and "worked with asbestos elsewhere as a pipefitter for 33 years." 538 U.S. at 143. Two of the other *Ayers* plaintiffs "had significant exposure to asbestos while working for other [non-railroad] employers." *Id.* Thus, railroads can be fully liable for all asbestos-related damages, including fear of cancer, not just to long-term employees, but also to former employees whose rail employment was fleeting.

---

[10] The Court recognized that railroads could pursue contribution and indemnity claims, as permitted under state law. 538 U.S. at 162. Often, however, this remedy is illusory, as many joint tortfeasors who are responsible for a plaintiff's harmful exposure to asbestos are out of business. By mid-2004, over 70 asbestos defendants have dissolved or filed for bankruptcy protection. RAND at 109.

C. Guidance By This Court Will Assure That Lower Courts Undertake Their Proper Gatekeeping Function and Will Avoid Non-Uniform Application of FELA

It is quite likely that without further guidance from this Court, many lower courts will at best pay lip service to their role as gatekeepers of fear of cancer claims. For example, in *Hensley v. CSX Transp., Inc.*, 2008 WL 683755 (Tenn. App. 2008), the court acknowledged that due to the emotional power of references to cancer, juries may well overcompensate plaintiffs for fear of cancer anytime the issue is brought before them. *Id.* at *16. Mysteriously, the court went on to hold that because jurors may be swayed to overcompensate by any mention of cancer, there is no point in instructing the jury that the plaintiff's fear must be genuine and serious. *Id.* The court justified this curious position by noting the role of trial courts as gatekeepers charged with ensuring that fear of cancer claims do not go to the jury in the first place unless there is credible evidence of genuine and serious fear. *Id.*

When it came time for the court to play its gatekeeping role, however, it deferred to the trial court's decision to permit the claim to go to the jury. The court found it sufficient that the plaintiff had testified that he experiences "anxiety" (as opposed to only "worry"), for which he was taking the prescription medication Xanax. The court held that even though the plaintiff testified that he began taking the medication before he learned he had asbestosis, the jury could conclude that his fear of cancer was "at least *part* of the reason [the plaintiff] has *continued* to take Xanax." *Id.* at *17. (emphasis in the original)

Gatekeeping like this will most assuredly open the floodgates to fear of cancer claims.

If this Court demurs from providing further guidance on this issue, confusion and lack of uniformity will continue whenever courts are confronted with fear of cancer claims in FELA cases. Some courts may take their gatekeeping role seriously and require that evidence beyond the plaintiff's stated "worry" is needed before a fear of cancer claim can go to the jury.[11] *E.g., Seaford v. Norfolk Southern Ry. Co.*, 824 N.E.2d 94, 110-112 (Ohio App. 2004), *rev'd on other grounds*, 835 N.E.2d 717 (Ohio 2005). Others, like the court below, undoubtedly will take a far more laissez faire attitude. In any event, this divergence of approaches likely will lead to a lack of uniformity in the interpretation of FELA and, inevitably, forum shopping, a practice facilitated by FELA's broad venue provisions.

FELA plaintiffs are provided with many options when choosing where to bring and maintain their lawsuit. A FELA suit may be brought in either state or federal court in any district in which the railroad does business, 45 U.S.C. §56; and, if a case is brought in state court, it may not be removed to federal court. 28 U.S.C. §1445(a). The four largest railroads in the United States each operate in over than 20 states, and as a result will face asbestos suits over a wide geographical area. Moreover, historically, courts have permitted plaintiffs wide latitude over selection of venue: naturally, plaintiffs often select a venue based on their perception of where courts are likely to

---

[11] The *Ayers* Court remarked that none of the plaintiffs' "notably thin" evidence of fear of cancer included any "corroborative objective evidence of his fear." 538 U.S. at 158, n.18.

interpret the law to their advantage. The FELA's venue provision gives plaintiffs "the right to select the court in which he considers it would be most advantageous for him to bring his action." *Petersen v. Ogden Union Ry. & Depot Co.*, 175 P.2d 744, 747 (Utah 1946). For example, the Montana Supreme Court does not recognize the doctrine of *forum non conveniens* in FELA cases, in part, in reliance on FELA's "policy favoring the injured worker's choice of forums [citations omitted] even if that choice of forum involves forum shopping." *State ex rel. Burlington Northern R.R. Co. v. District* Court, 891 P.2d 493, 499 (Mont. 1995).[12] Though FELA is to be interpreted uniformly, *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953); *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 150 (1917), plaintiffs who intend to allege fear of cancer no doubt will select a forum in which the court is likely to permit such a claim to go to the jury with minimal evidence.[13]

Though this Court held that "[i]t is incumbent upon [a plaintiff seeking fear of cancer damages] to prove that his alleged fear is genuine and serious," *Ayers*, 538 U.S. at 157, without further guidance lower courts are likely to continue to address the issue presented here in a disparate manner. Moreover, plaintiffs in FELA asbestos and other exposure cases are likely to seek out courts which, like the court below, will eschew their responsibility to remain faith-

---

[12] The Court held that "a district court in this state may not dismiss a FELA action because it deems itself to be an inconvenient forum" and "that a district court in this state is not empowered to change the place of trial of a FELA action based on the doctrine of *forum non conveniens*." 891 P.2d at 499.

[13] Asbestos litigation has long been characterized by efforts of plaintiffs to seek favorable jurisdictions. RAND at 61-63.

ful to the *Ayers* requirement that only plaintiffs with genuine and serious fear may qualify for fear of cancer damages. The outcome will be "uncabined" liability for fear of cancer damages—a clear departure from the holdings of *Gottshall*, *Buckley* and *Ayers*. This result will be avoided if this Court grants the petition and provides guidance on the evidentiary burden a plaintiff alleging an asbestos-related injury must meet to establish a "genuine and serious" fear of contracting cancer.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.

Respectfully submitted,

DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus

* Counsel of Record

October 2, 2008